

## REMARKS

Claims 1-17, 19, and 21 are pending in the application. In this response, no claims have been amended, cancelled, or added.

Applicants respectfully request the Examiner to reconsider and withdraw the outstanding rejections in view of the following remarks.

### **Rejection under 35 U.S.C. § 103**

Claims 1-17, 19, and 21 have been rejected under 35 U.S.C. § 103(a) as allegedly unpatentable over U.S. Patent No. 5,509,915 (hereinafter "Hanson"). This rejection is respectfully traversed.

It should be noted that the Office has the initial burden of establishing a **factual basis** to support the legal conclusion of obviousness. In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). For rejections under 35 U.S.C. § 103(a) based upon a combination of prior art elements, in KSR Int'l v. Teleflex Inc., 127 S.Ct. 1727, 1741, 82 USPQ2d 1385, 1396 (2007), the Supreme Court stated that "a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art." "Rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some **articulated reasoning with some rational underpinning** to support the legal conclusion of obviousness." In re Kahn, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006) (emphasis added).

Independent claim 1 recites an absorbent article comprising, *inter alia*, a liquid-permeable covering layer with a **wetting angle of at least 120°**.

The Examiner relies on surge management portion 46 to allegedly correspond to the claimed liquid-permeable covering layer.

The Examiner asserts that "the contact angle [in Hanson] would at least be very similar." The Examiner has provided no reasonable basis for this statement. As stated above, the Office has the initial burden of establishing a **factual basis** to support the legal conclusion of obviousness. The Examiner has not met this burden. There is no disclosure of facts to establish that the surge management portion 46 of Hanson is "very similar" to the claimed liquid-permeable covering layer.

Further, in contrast to the Examiner's position that it would have been obvious to modify the contact angle of Hanson to arrive at the presently claimed invention, Hanson actually teaches away from the presently claimed invention. Hanson discloses that *contact angles of less than 90°* are desired in at least selected areas of the surge management portion, and provides material examples to reduce the contact angle below 90°. (Col. 26, lines 9-16; wettable fibers have contact angles less than 90° - see Col 12, lines 45-50). Hanson also provides material examples to *reduce* the contact angle *below 90°*. (Col. 26, lines 17-26).

In contrast, the wetting angle in the present claims is at least 120°. Accordingly, it is respectfully submitted that Hanson clearly *teaches away* from the covering layer having a wetting angle of at least 120° as recited in claim 1. Noting that it is the Examiner's position that it would be obvious to one of ordinary skill in the art to modify the contact angle, Applicants direct the Examiner's attention to M.P.E.P. § 2143.01, wherein it is provided that if the proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. (See, In re Gordon, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984)).

Additionally, the Examiner attempts to rely on a disclosure in Hanson at column 7, lines 36-40, of a basis weight of about 22 gsm in a layer to arrive at the claimed contact angle. However, the Examiner is relying on a disclosure of a basis weight for top sheet 28 of Hanson, and not surge management portion 46. Accordingly, this disclosure is irrelevant and the Examiner is improperly relying upon it.

As such, it is respectfully submitted that not only does Hanson fail to disclose or suggest all the features recited in the pending claims (please refer to response filed on October 18, 2007, which is herein incorporated in its entirety), but Hanson teaches away from the covering layer having a wetting angle of at least 120° as recited in claim 1.

In the Office Action dated January 25, 2008, the Examiner's position is that the contact angle would at least be very similar and it would have been obvious to one of ordinary skill in the art to modify the contact angle to provide the most effective product since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable range involves only a

level of ordinary skill in the art since Hanson anticipates parameters that would include modifications in the contact angle as set forth in Col. 24, lines 35-41. (Office Action dated January 25, 2008, Page 5).

In view of the above, it appears that the Examiner's position is that one of ordinary skill in the art would adjust Hanson's wetting angle to the presently recited wetting angle of at least 120°. However, the Examiner provides no reason for the foregoing except for relying on Hanson's generic disclosure at Col. 24, lines 31-41. Applicants respectfully submit that the Hanson's generic disclosure must be interpreted within the scope and spirit of the rest of Hanson's disclosure which clearly discloses contact angles of *less than* 90°. Hanson's generic disclosure cannot be unreasonably interpreted to encompass contact angles of greater than 90° because such interpretation would be in direct contradiction with the rest of Hanson's disclosure.

Applicants also note that when the PTO seeks to rely upon a chemical theory, in establishing a prima facie case of obviousness, it must provide evidentiary support for the existence and meaning of that theory. In re Eynde, 480 F.2d 1364, 1370, 178 USPQ 470, 474 (CCPA 1973). Applicants further respectfully submit that when an Examiner relies on a scientific theory, evidentiary support for the existence and meaning of that theory must be provided. In re Grose, 592 F.2d 1161, 201 USPQ 57 (CCPA 1979). See M.P.E.P. § 2144.02.

Based on at least the foregoing, Hanson not only fails to disclose or suggest a wetting angle of at least 120°, as presently recited, but Hanson also *teaches away* from the presently recited contact angles.

Further, Independent claim 1 recites an absorbent article comprising, *inter alia*, a liquid-transfer layer with a **pore volume distribution curve with a maximum at a pore radius of from 105 to 325 µm**.

The Examiner asserts that Hansen teaches a liquid transfer layer (allegedly layer 71) including a pore radius greater than 50 micrometers. The Examiner relies on column 17, lines 8-11, of Hanson. However, this section of Hanson recites that "no more than about 5 percent of the maximum pores ... are greater than about 50 micrometers in diameter." This is a teaching that a corresponding pore volume distribution **curve** would have a maximum (the top of the peak) at less than 50

micrometers. The Examiner has improperly applied Hanson. Hanson does not teach or suggest the presently claimed invention. Hanson does not teach or suggest a pore volume distribution **curve** with a maximum at a pore radius of from 105 to 325  $\mu\text{m}$ .

As such, it is respectfully submitted that not only does Hanson fail to disclose or suggest all the features recited in the pending claims.

Applicants further submit that the remaining claims are patentable based at least upon their dependence from claim 1.

### **Conclusion**

Applicants invite the Examiner to contact Applicants' representative at the telephone number listed below if any issues remain in this matter, or if a discussion regarding any portion of the application is desired by the Examiner.

In the event that this paper is not timely filed within the currently set shortened statutory period, Applicants respectfully petition for an appropriate extension of time. The fees for such extension of time may be charged to our Deposit Account No. 02-4800.

In the event that any additional fees are due with this paper, please charge our Deposit Account No. 02-4800.

Respectfully submitted,

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Date: March 13, 2008

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